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April 20, 2009

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: *Ex Parte* Submission, WC Docket Nos. 08-24, 08-49

Dear Ms. Dortch:

Broadview Networks, Inc., Cavalier Telephone, Covad Communications Company, NuVox, and XO Communications, LLC, by their attorneys, hereby submit the enclosed analysis to support the position that mobile wireless services are not adequate substitutes for wireline services and that the Commission therefore should not include mobile wireless services in the same product market as wireline services when conducting its competitive market analysis in the above-referenced unbundled network element ("UNE") forbearance proceedings.

In assessing whether to grant a petition for forbearance under Section 10 of the Act,¹ the Commission must determine the extent to which the petitioner faces facilities-based competition in the provision of the services for which it seeks forbearance. Over the past several years, as mobile wireless usage has increased, the Commission in some circumstances has included certain mobile wireless lines in the wireline services product market when conducting its competitive analysis.² But including cut-the-cord wireless lines in the wireline services

¹ 47 U.S.C. § 160.

² See, e.g., *Verizon/MCI Merger Order*, 20 FCC Rcd at 18481-83, ¶¶ 90-91; *AT&T BellSouth Merger Order*, 20 FCC Rcd at 18340-42, ¶¶ 89-90. See also *Qwest Section 272 Forbearance Order*, 22 FCC Rcd at 5226-27, ¶ 35; *Section 272 Sunset Order*, 22 FCC Rcd at 16462-63, ¶ 42.

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product market is contrary to widely accepted economic practice in assessing competition and, in fact, overstates the extent of competition.

In the *Qwest 4-MSA Order*,³ although it was not dispositive to the outcome of the proceeding, the Commission allowed cut-the-cord wireless lines to be included in calculating the extent of competition in the residential wireline services product market. Although the inclusion of cut-the-cord wireless lines did not affect the outcome of that proceeding, then-Commissioner Copps criticized the Commission's rush to judgment, stating that before cut-the-cord wireless lines can potentially be included in the Commission's market review, a "rigorous analysis" that addresses "important questions about what is the appropriate market, does wireless substitution act to constrain pricing, how do you account for the fact that wireless service is generally not a substitute in the business market, and what type of survey data is appropriate to be used" must be "sufficiently considered."⁴

Since release of the *Qwest 4-MSA Order*, both the U.S. Department of Justice ("DOJ") and Ofcom, the telecommunications regulatory authority in the United Kingdom, have conducted rigorous analyses and released reports that conclude, based on the widely accepted methodology for defining relevant product markets, that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services.

In reaching its conclusion,⁵ DOJ relied on the *Horizontal Merger Guidelines*' generally accepted methodology for defining relevant product markets.⁶ Relevant product markets are defined in the *Horizontal Merger Guidelines* based on the "SSNIP" test: absent price discrimination, a product or group of products can be defined as a market if "a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in

³ *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd 11884, ¶19 (2008) ("*Qwest 4-MSA Order*").

⁴ *Qwest 4-MSA Order*, 23 FCC Rcd 11884, Concurring Statement of Commissioner Michael J. Copps, at 1.

⁵ U.S. Dep't of Justice, *Voice, Video and Broadband: The Changing Competitive Landscape and its Impact on Consumers*, (Nov. 2008) ("*DOJ Report*"), available at <http://www.usdoj.gov/atr/public/reports/239284.pdf>.

⁶ U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (rev. ed. Apr. 8, 1997) ("*Horizontal Merger Guidelines*"), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

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price.”⁷ In other words, if a “small but significant and nontransitory increase in price” by a hypothetical monopoly supplier would be profitable, *i.e.*, would not be constrained by migration to alternative services, the product is properly classified as a distinct product market from the alternative services. Conversely, if a “small but significant and nontransitory” price increase by a hypothetical monopoly supplier would result in a reduction in sales of the product large enough that the monopolist would not find it profitable to impose such an increase, the product group should be expanded to include the product under consideration.

While DOJ acknowledged that evidence demonstrates that migration from wireline to mobile wireless services is having an effect on the number and usage of residential lines serviced by incumbent wireline carriers, it found no evidence that this migration to date has effectively constrained the prices consumers pay for access to wireline telephone service. Specifically, DOJ found:

[T]he existence of some consumers who choose to substitute wireless service for access to the landline network does not demonstrate that wireless service is an effective constraint on prices for access to landline services. That determination turns in part on the number of customers who would choose to substitute to wireless services entirely in response to a specified price increase for landline telephone service, compared with the number of customers who would choose to stay with landline and pay the additional price. The size of that wireless substitution effect is not known. However, there are reasons [] to think that wireless is not by itself an effective competitive constraint today.⁸

Because evidence of a price constraint is a prerequisite to determining that cut-the-cord wireless lines should be considered part of the wireline services market, and no such price constraint is present, DOJ concluded that wireline and wireless services are separate product markets.⁹

⁷ *Horizontal Merger Guidelines*, § 1.11.

⁸ *DOJ Report*, at 65, citing *Horizontal Merger Guidelines*, § 1.1.

⁹ *DOJ Report*, at 66. In support of this conclusion, the *DOJ Report* repeatedly cites to the oral testimony of Dr. Simon J. Wilkie at its November 29, 2007 public workshop. See *Transcript, Public Workshops, Antitrust Division, 2007 Telecommunications Symposium, “Voice, Video and Broadband: The Changing Competitive Landscape and its Impact on Consumers,”* pp. 128-29, 157-59, available at <http://www.usdoj.gov/atr/public/workshops/telecom2007/230473.pdf>.

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Ofcom has reached the same conclusion. In March of this year, Ofcom initiated a consultation to consider the state of competition in the retail narrowband telephony market in the United Kingdom.¹⁰ As part of its consultation, Ofcom looked at indications of increased competition to fixed wireline services from mobile wireless services. Ofcom applied the widely accepted SSNIP methodology¹¹ and found, as did DOJ, that wireline and wireless services are in separate product markets. The *Ofcom Report* found that while there is evidence of some substitutability between wireline and mobile access, consumers predominantly view the two types of services as meeting different needs and have a strong preference to purchase both wireline and mobile access.¹² On the basis of this evidence, Ofcom concluded that for both residential and business customers wireline and mobile services are appropriately considered to be in separate product markets.¹³

More specifically, applying the SSNIP methodology, Ofcom determined that assuming mobile and wireline calls were in the same product market, if the price of mobile calls were to fall wireline providers would react by cutting their prices or, if they chose to hold prices, their call volumes would fall.¹⁴ However, while the average revenue per minute charged by mobile wireless operators declined by 22% between 2002 and 2007, wireline prices in the U.K. have remained relatively unchanged over the same period.¹⁵ Wireline call volumes also have held up well despite the lower absolute and relative costs of mobile calls, falling by only 10%.¹⁶ Thus, while Ofcom found clear evidence of increasing wireline to wireless migration, it did not believe that such migration is sufficiently strong to prevent a hypothetical monopoly supplier of wireline calls from raising prices by 5-10%.¹⁷ Based on this evidence, Ofcom concluded that residential wireline calls constitute a relevant economic market. Ofcom also determined that business wireline calls constitute a separate product market from wireless based on its finding

¹⁰ Ofcom, *Fixed Narrowband Retail Services Market: Consultation on the Identification of Markets and Determination of Market Power* (rel. Mar. 19, 2009) (“*Ofcom Report*”) available at: http://www2.ofcom.org.uk/consult/condocs/retail_markets/fnrsm.pdf.

¹¹ *Ofcom Report*, at 15, ¶ 4.3.

¹² *Ofcom Report*, at 21, ¶ 4.34.

¹³ *Id.*

¹⁴ *Ofcom Report*, at 28, ¶ 4.72.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Ofcom Report*, at 30, ¶ 4.78.

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that “businesses appear to be very reluctant to switch from fixed [wireline] to mobile access even in response to very large changes in relative prices.”¹⁸

In the U.S., while it may be the case that a subgroup of residential customers have cut-the-cord and have replaced wireline with wireless service, it is not the case that mobile wireless service usage currently constrains wireline service market power to any economically significant degree. To the contrary, as concluded by Dr. Kent Mikkelsen in a report submitted in the *Qwest 4-MSA* docket, “in response to a small wireline price increase, purchasers of wireline service would not turn from wireline service to mobile wireless service in such great numbers that the wireline price increase would be unprofitable. In other words, one cannot rely on the presence of mobile wireless alternatives to constrain the price of wireline service.”¹⁹

Moreover, the lack of pricing discipline on wireline services exhibited by mobile wireless services is not the only evidence that wireless services are not adequate substitutes today for wireline services. As noted by Dr. Trevor Roycroft in a March 2009 report prepared for TURN – the Utility Reform Network to address the issue of whether California’s largest wireline telephone companies continue to possess market power, “[t]he service quality associated with wireless offerings may make substitution of wireless for wireline impractical for many consumers.”²⁰ Dr. Roycroft noted that the “significant and systematic differences in the types of individuals” that use wireless-only services prove that wireless and wireline services are not widely acceptable substitutes.²¹ Further, Dr. Roycroft reported that Verizon’s recent announcement that it may consider offering limited wireline service for \$5 per month – which it links to the abandonment of wireline service – “suggests a market segmentation strategy rather

¹⁸ *Ofcom Report*, at 31 ¶¶ 4.89. Ofcom found that business’s preference to retain wireline service appears to be primarily driven by non-price factors with only 24% of research respondents indicating that they would be prepared to substitute mobile service for fixed wireline service should the current price differential be eliminated. *Id.*, ¶ 4.87.

¹⁹ Kent W. Mikkelsen, *Mobile Wireless Service to “Cut the Cord” Households in FCC Analysis of Wireline Competition* (Apr. 2008) (“*Mikkelsen White Paper*”), appended to Letter from Brad Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-97 (filed Apr. 22, 2008).

²⁰ Trevor R. Roycroft, *Why “Competition” is Failing to Protect Consumers*, Prepared on Behalf of TURN (The Utility Reform Network) (Mar. 25, 2009), at 10, available at <http://www.turn.org/article.php?id=838&printsafe=1>.

²¹ *Id.*, at 13. Dr. Roycroft listed these factors as the age of household head, the race of household head, the larger size of the household, home ownership, marriage, the presence of individuals with health problems, the presence of individuals with a disability and higher income levels. *Id.*

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than a broad competitive pricing response” since the \$5/month service envisioned by Verizon would place substantial limits on calling and may only be available as part of a bundle.²²

Dr. Roycroft’s conclusions regarding the differences between wireless and wireline services are consistent with the views recently expressed to the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) by a number of commenters. In response to the joint request by NTIA and RUS for information on implementation of the broadband stimulus provisions of the Recovery Act,²³ several commenters argued that the broadband definitions, speed thresholds, and network nondiscrimination and interconnection obligations that should be adopted as contractual conditions of broadband stimulus grants should take into account the material technical differences between wireless and wireline networks including, importantly, that spectrum used to provide wireless services is shared among users while wireline service providers offer dedicated lines to subscribers.²⁴

For all of the foregoing reasons,²⁵ for purposes of assessing competition in conducting its UNE forbearance analysis, the Commission should follow the widely accepted

²² *Id.*, at 14, quoting “Verizon May Offer Landline Place for \$5,” Wall Street Journal (Feb. 17, 2008), available at <http://online.wsj.com/article/SB123483395304696039.html>.

²³ *See American Recovery and Reinvestment Act of 2009 Broadband Initiatives*, Joint Request for Information and Notice of Public Meetings, Docket No. 090309298-9299-01, 74 Fed. Reg. 10716 (Mar. 12, 2009).

²⁴ *See, e.g.*, Comments of CTIA – The Wireless Association, Docket No. 090309298-9299-01, National Telecommunications and Information Administration, Rural Utilities Service (filed Apr. 13, 2009), at 7-9; Comments of Rural Cellular Association, Docket No. 090309298-9299-01, National Telecommunications and Information Administration, Rural Utilities Service (filed Apr. 13, 2009), at 25-28.

²⁵ It also bears mention that one consequence of a Commission finding that mobile wireless services are substitutes for wireline telephone exchange services is the potential for state regulation of mobile wireless services. Section 332(c)(3) of the Act preempts “State or local government ... authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service” except “where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State...” In such circumstances, mobile wireless services may be subject to “requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.” More generally, states may petition the Commission for authority to regulate the rates for any mobile wireless service and the Commission shall grant such petition if such state demonstrates that market conditions fail to protect subscribers from unjust or unreasonable or unreasonably discriminatory rates and “such service is a replacement for land line telephone exchange service for a

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methodology for defining relevant product markets. Application of this methodology compels the conclusion that mobile wireless services do not belong in the same product market as wireline services.

Respectfully submitted,

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and XO Communications, LLC*



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